

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
) September 8, 2016
) Minneapolis, Minnesota
) Courtroom 12W
) 2:37 p.m.
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

(2:37 p.m.)

THE COURT: Please be seated. Can the phone participants hear us?

MAGISTRATE JUDGE NOEL: Can you hear us on the phone? Hello telephone people. Can the people on the phone hear us?

THE COURT: They're probably talking. It's like one of those death penalty cases. They just can't hear us.

MAGISTRATE JUDGE NOEL: Can you hear me now?

MR. GORDON: I heard some background noise a minute ago and then maybe we lost them.

MAGISTRATE JUDGE NOEL: Can you hear me now?

UNIDENTIFIED VOICE: Yes.

THE COURT: All right. We have the joint proposal on what we ought to talk about today. Let's just run through that, shall we?

The discovery dispute was a big one, and we already talked about that. So the proposed Plaintiff Fact Sheet, it looks like we do not have issues remaining on that that need to be decided, is that correct?

MR. GORDON: That's correct, Your Honor. We did reach agreement on the substance of the fact sheet. And I believe we've reached agreement now on the process for service.

1 MS. AHMANN: Not completely final, but we're
2 getting there.

3 THE COURT: Okay. The time, the deadline was
4 August 26th or so, wasn't it?

5 MS. AHMANN: I can attest that we have been
6 diligently meeting and conferring and going back and forth.
7 We are 99 percent there, but we need to get it finalized as
8 to not the Plaintiff Fact Sheet itself is good. What we're
9 working on is the process primarily of deficiencies and how
10 those are going to be handled.

11 THE COURT: Okay.

12 MS. AHMANN: So we're working on a PTO to enter
13 that. And we're also doing some background work on exactly
14 how this should be electronically done for secure transfers
15 and that sort of thing.

16 THE COURT: Okay.

17 MS. AHMANN: That we won't hold up on. We can
18 follow up, but we do need to get sign off on deficiencies
19 which we're very, very, close to. We just didn't have time
20 to finalize it before we came here.

21 MR. GORDON: So, Your Honor, Ben Gordon for the
22 plaintiffs, pursuant to your agreement last week to give us
23 an extra week, we did reach agreement on the substance of
24 the PFS in all respects, so we're happy to report, but I
25 think the process is just taking a little longer, and we're

1 very close on that.

2 THE COURT: Do you need our input at all? Do you
3 need any let's just call it "help" from us?

4 MR. GORDON: Honestly, Your Honor, I think we're
5 going to get there. It's just in their court right now, and
6 I think we're very close.

7 MS. AHMANN: Yes, we're very close. I don't think
8 we need any help. It's just a matter of quite frankly of
9 timing.

10 THE COURT: All right. Thank you.

11 MS. AHMANN: Thank you.

12 MR. GORDON: Thank you, Your Honor.

13 THE COURT: The new schedule we have agreement on
14 some and not agreement on others.

15 MR. GORDON: Yes, Your Honor. Would you like us
16 to address that?

17 THE COURT: Yes.

18 MR. GORDON: We halfway -- Ben Gordon for the
19 plaintiffs again -- suspected we would come in here and you
20 would have an order for us already as you did the prior
21 time.

22 But I would agree with you, Your Honor, we do have
23 an agreement on the proposed for an amended pretrial
24 scheduling order. The primary areas of disagreement from
25 the plaintiff's point of view, Your Honor, are very few.

1 Number one, we, as has been mentioned in the past,
2 we do think a DFS, a Defense Fact Sheet is important, an
3 important component of this, Your Honor, so we added that to
4 our list. We're flexible somewhat on the date, of course,
5 but in every MDL I've ever worked on, we've had a Defense
6 Fact Sheet. And however brief that needs to be, we can work
7 on that. But it is the counterpart to the Plaintiff's Fact
8 Sheet, Your Honor, and we need that in order to prevent the
9 inefficiency of having to have, at this point, 650 and
10 eventually thousands of plaintiffs all having to propound
11 interrogatories about very specific core issues mainly
12 relating to who their clients are. That is 3M's clients in
13 terms of the machines that are used on individual
14 plaintiffs, because when we get into case specific fact
15 discovery, and we have to make our case and prove our case
16 with respect to the exposure to a particular machine, we
17 need that information, and they have that information. The
18 easiest way for us to get it is for them to answer a very
19 short Defense Fact Sheet, just like we're doing with the
20 PFS, Your Honor. So we added that.

21 The next thing we disagree about the most in this
22 proposed amended scheduling order is their proposal to cut
23 off general causation at December 30th. We've added a date
24 of a very modest extension to January 20th you may see, Your
25 Honor. That I realize is only three weeks, but it's an

1 important three weeks. As the Court has heard, and there
2 may be further argument on some of the discovery issues,
3 there's a lot more to be done on general causation.

4 Importantly, 3M has changed the language, I'm not
5 sure exactly why, to say "non case specific causation" for
6 that and moved it up to December 30th. We would urge the
7 Court to keep it at least to January 20th to give us time to
8 complete the general causation discovery.

9 The next biggest point of contention I think we
10 have is that they would like --

11 THE COURT: Mr. Gordon, can you explain the
12 significance of those three weeks? Is it a holiday issue?

13 MR. GORDON: It's part of that, Your Honor,
14 exactly. So we think we already are a bit under the gun, if
15 we're being realistic, to get the general causation
16 discovery done by the beginning of the year. When you add
17 to that the holiday season between say December 20th and
18 January 1st, I think we lose a lot of time there. So I
19 think most folks are back at work hard by January 2nd, and
20 to try to cut the process off with a trial date of November
21 by the end of this year is just unrealistic, and we'll be
22 coming back seeking more time.

23 I, frankly, think January 20th is pushing it, but
24 we're willing to live with it. I just want to get as much
25 time into January as we can to finish the process.

1 The next thing I think we have the most heartburn
2 about, Your Honor, in their proposal is the proposal that
3 they get to take the depositions of our experts before they
4 even disclose their experts. I've never worked on an MDL
5 where that's been the process. The dates aren't all that
6 different. Their dates are January 13th. I would point out
7 that's 14 days after their proposed cut-off for general
8 discovery for our experts' reports, which I think is again
9 pretty tight. We're going to need a little extra time then.
10 So we've proposed March 1st to produce our expert reports,
11 which still gives us plenty of time to do the rest of the
12 discovery and prepare for trial.

13 We've proposed April 3rd for their expert reports,
14 and then June 2nd for depositions of both sets of experts to
15 be done. That gives us a 90-day window between March 1st
16 and June 2nd to do that expert process. Your Honor, they
17 would ask that we produce our expert reports by January
18 13th, and a scant 34 days later they depose our experts
19 before they tell us anything about their experts. And then
20 they give us their expert reports on March 1st, and we
21 depose their experts by April 1st.

22 I think again that's probably unrealistic when you
23 look at all the schedules of the witnesses and the lawyers
24 involved to try to get all of that done between January and
25 March, so we've proposed March to June and ask that they

1 give us their expert reports before they get to depose our
2 experts.

3
4
5 For the most part, the rest of the order is fairly
6 agreeable. Most items have been expressly agreed to until
7 you get to number paragraph 20, which is 19 I think on
8 their's and 20 on ours, on the proposal that we discussed in
9 court last time for case specific experts for bellwether
10 cases.

11 We've proposed an approach sort of an answer to
12 Judge Noel's question last time about this issue of do we
13 need to have case specific experts of making it an optional
14 process under which if we believe we need case specific
15 experts to prove our case and we haven't accomplished that
16 already, that we have the option of naming those experts
17 starting in by July 15 of 2017, and then the dates
18 correspond from there.

19 Their verbiage is a little different, and they
20 made it expressly experts for selected bellwether cases
21 beginning that process in May. And, again, asking for their
22 witnesses' deposition -- their lawyers to be able to take
23 our experts' depositions before they even disclose their
24 case specific rebuttal experts. Again, we would think to
25 the extent there are case specific experts, they should

1 be -- the plaintiff should disclose their's. The defense
2 should disclose their's, and then we should take the
3 depositions of both. Those are the primary areas I wanted
4 to comment on, Your Honor.

5 THE COURT: All right. Thank you, Mr. Gordon.

6 Mr. Blackwell?

7 MR. BLACKWELL: Good afternoon, Your Honors.

8 THE COURT: Good afternoon.

9 MR. BLACKWELL: Everyone. I agree with some of
10 what Mr. Gordon said. We did agree on most of the dates,
11 but we do have some fairly significant issues of difference.

12 This issue of the Defendant Fact Sheet is one that
13 the Court has already addressed. This was raised before.
14 It was discussed before. It was ruled on before. That
15 there was no need for the plaintiffs to be requiring a
16 Defendant Fact Sheet from the defendants when they can
17 simply ask what they want to ask in discovery. And as Your
18 Honors have seen already, they certainly have no problems
19 asking for a lot in discovery. And they can ask that, could
20 have asked that as well.

21 As to wanting to find out from the defendants
22 about the particular machine that the plaintiff was using,
23 that's part of the Plaintiff's Fact Sheet. It's their case.
24 They're the ones who are claiming that there's a machine we
25 made that's causing the plaintiff to have a surgical site

1 infection. There is no need to ask us that in Defendant's
2 Fact Sheet, why would 3M know what particular machine or
3 unit that the plaintiff was using at a particular hospital?

4 But the point is, and I think this particular
5 issue previously was argued in fact to Your Honor, Judge
6 Ericksen, and the response to the plaintiffs, well, you can
7 ask what you want in discovery. There's not a need for a
8 Defendant Fact Sheet for things such as information on the
9 particular machine the plaintiff was using when that is the
10 plaintiff's burden, since there's got to mean something that
11 they start a lawsuit claiming that you made a machine that
12 causes surgical site infection in my client for the
13 plaintiffs. And that ought to presuppose a couple of things
14 that in fact you've got some evidence as to the fact they
15 were using a particular machine, and you can identify what
16 it was. And you have some good faith basis based upon
17 competent expert testimony for making that assertion in the
18 first place just to satisfy requirements under Rule 11. And
19 that factors into some of our other basic areas of
20 disagreement.

21 With respect to the initial expert reports where
22 the plaintiffs would be in favor of some scenario where we
23 either are -- we're disclosing experts simultaneously. And
24 I would submit, and I can't speak to Mr. Gordon's
25 experience. I mean he does quite a lot as a source for what

1 the Court should do based on his experience in MDLs.

2 I've got my own, and I've been in many a case
3 where in order for the defendant to know what is the case
4 the defendant is to meet, the defendant is entitled to know
5 who is going to opine as to the plaintiff's expert, what he
6 or she is going to say in writing and both in a deposition,
7 and then you can make an informed decision about what
8 experts you want to then name as a defendant, and what
9 opinions they need to espouse. And so all that this
10 presupposes is a process where the plaintiffs first --

11 MAGISTRATE JUDGE NOEL: Can I ask you a question,
12 Mr. Blackwell? Can you give me some examples where you've
13 gone through, where you actually required depositions before
14 the defendant depositions of the plaintiff's expert before
15 the defendants even required to identify an expert?

16 MR. BLACKWELL: Yeah, I have, Judge Noel, and
17 actually in federal courts in many parts of the country
18 that's been the case where it is viewed the plaintiffs have
19 the burden of proving their claim with respect to causation.
20 And in some ways, it seems to save the Court time that
21 before the defendant discloses, there is a fulsome
22 understanding of what the plaintiff's assertion in fact is,
23 and as opposed to having to put up an expert who is sort of
24 shooting to some extent in the dark.

25 As to what is the basis for the plaintiff's claim

1 then, we couldn't be more in the dark at this point as to
2 what their basis is for claiming that the Bair Hugger causes
3 surgical site infections. We didn't get a good sense of it
4 from science day other than looking at computational flow
5 dynamics, those animations that the plaintiffs brought in
6 here, and everything else we've asked them about sort of
7 what was your basis in making this claim in the first place,
8 what you should have had when you started the lawsuit.
9 We've been told every time this is simply premature.

10 THE COURT: Could you just give me a second?

11 (Off the record Court discussion.)

12 (In open court.)

13 MAGISTRATE JUDGE NOEL: All right. Let me just
14 ask one other question on that expert issue. So my
15 understanding of the current pretrial order number 4 is
16 initial expert reports and disclosures are due on December
17 1st of 2016. And that by "initial expert," I understand
18 that to be any expert witness that a party is going to call
19 to testify about an issue as to which that party has the
20 burden of proof. So under these circumstances, nearly all
21 of the initial experts presumably would be on the
22 plaintiff's side. Although, I suppose if there's some
23 affirmative defense you pled or something that you, the
24 defendant, has the burden of proof on some issue and wants
25 to call an initial expert, you would have to meet that. But

1 the rebuttal experts then would be experts who are going to
2 be testifying in rebuttal to whatever initial experts have
3 been disclosed; is that your understanding?

4 MR. BLACKWELL: That is my understanding, Your
5 Honor. That is. And, again, everything I said was sort of
6 premised on the idea that we would first be able to discover
7 what opinions the plaintiff's experts are affirmatives
8 espousing and to understand what they are and what the basis
9 for those opinions are and have an opportunity to explore
10 them.

11 THE COURT: You mean to take to their --

12 MR. BLACKWELL: Take the depositions.

13 MAGISTRATE JUDGE NOEL: I guess my only thought on
14 that is ever since I was a lawyer and sort of followed the
15 adage about the best defense being a good defense, so that
16 defendants, even though they responding to things, they are
17 working right away from the beginning and are preparing
18 their case and, presumably, are retaining their experts and
19 sort of getting geared up. And so I don't, I guess it
20 surprises me, which was more of my question, I've never seen
21 a case where a defendant has actually been given the
22 opportunity to depose the plaintiff's experts before they
23 even have to identify their own experts, because my sense is
24 good defense lawyers probably already have their experts on
25 retainer or at least identified for themselves so that

1 they're ready to go when the time comes. So --

2 MR. BLACKWELL: And we obviously have them, and I
3 understand, Your Honor, that I'm swimming upstream on this
4 one, based on Your Honor's own experience, I understand
5 that. I have many cases where I have been allowed to do it,
6 and we, obviously, you've seen from science day have in mind
7 certain experts and what they may say.

8 MAGISTRATE JUDGE NOEL: And I understand that
9 you're deposing a bunch of folks from around the world.

10 MR. BLACKWELL: Yes.

11 MAGISTRATE JUDGE NOEL: Who have written articles
12 that plaintiffs have been relying on, so you'll have a
13 better sense after that, I would assume, of what their case
14 is based upon.

15 MR. BLACKWELL: Except they haven't said they
16 necessarily are relying on those motions. Those are
17 depositions that we have noticed, Your Honor.

18 MAGISTRATE JUDGE NOEL: Right, that you've
19 identified those folks to depose because they've written
20 articles, right, on this topic?

21 MR. BLACKWELL: Right, but still, again, there is
22 an over-arching kind of issue and question in the case as
23 to, you know, what the good reliable science says that this
24 forced air warming device causes surgical site infections,
25 and whether there's a reliable scientific methodology for

1 ruling out the other causes. And what their experts are
2 going to say in that regard and what the basis for those
3 are, we just don't know. Completely in the dark. But
4 you've heard the position on that.

5 THE COURT: This is maybe, well, anyway, I'm not
6 going to preface it. Do the rules allow you to reserve time
7 if you were desperate to take a deposition after you got the
8 -- could you reserve some hours of your deposition time?

9 MR. BLACKWELL: Well, there isn't a rule that
10 precludes it. It would probably be a matter that we'll have
11 to take up with Your Honors to permit it.

12 THE COURT: Well, if it wasn't going to make it go
13 over your maximum number of hours. I mean would it be
14 impossible for you to do it if you decided that that was
15 necessary?

16 MR. BLACKWELL: It would not be impossible, no,
17 Your Honor.

18 MAGISTRATE JUDGE NOEL: I'm not sure if I'm
19 understanding the Court's question correctly. Could you, I
20 think what Judge Ericksen is asking is could you notice a
21 deposition of a plaintiff's expert before you disclose your
22 experts? Ask a certain number hours of questions but not
23 use your full seven, and then come back and finish after
24 you've reviewed all the other reports in the case?

25 MR. BLACKWELL: Yes, Your Honor, certainly that

1 would be agreeable to us, and I'm also certain that that
2 would be an issue that the plaintiff's would raise to the
3 Court. Their position would be you're one and done, and
4 we'd have to have an argument around it. I'm certain of it,
5 you know, but that would be one approach.

6 I mean it will all come out in the wash.
7 Ultimately, in any event, we'll get at it. But the idea
8 here was that if they're going to be Daubert motions,
9 ultimately, on questions of, first, general causation, which
10 is non case specific. It's across the board. Do you have
11 any good science being able to prove that this device causes
12 surgical site infections? And can you rule out through any
13 reliable methodology other known causes? It's a general
14 question. And we know that that is initially the biggest
15 question in the case. It has been from the beginning, and
16 we went through science day and still is, so we wanted to
17 make sure there's fulsome discovery and an opportunity to
18 explore all of the opinions such that we have meaningful
19 Daubert motions and hearings. So that was the idea there.

20 But our proposed Daubert date is May 1 of 2017.
21 They proposed June 15th, but we figured by this time, we've
22 given the discovery that would have taken place in the case,
23 they had the burden that the plaintiffs should have had to
24 have proper competent expert testimony before they even
25 filed the lawsuit. That May 1st should be plenty of time

1 for them to have to come forward to be able to show the
2 Court what they should have had before they filed the
3 lawsuit in the first place.

4 Now, we have some disagreement over the case
5 specific bellwether expert issues. And this was a little
6 confusing the last time. And, Your Honors, I must confess
7 to not completely understanding what the plaintiff's
8 position is because even if they were able to surmount the
9 hurdle relating to general causation, that there is some
10 competent, sufficiently competent science to let them get
11 past the Daubert hurdle in a general sense.

12 There still is the very large question as to
13 whether or not they can prove that the Bair Hugger was the
14 cause in the specific case. And that's a whole different
15 panoply of consideration that will be plaintiff specific,
16 and you still have the same questions as to whether any
17 expert who opines that in this specific case it was the Bair
18 Hugger has an opinion that's based upon competent and
19 reliable expert facts, opinion. And that will have to get
20 ferreted out in each individual case because each individual
21 defendant is different, with respect to the case specific
22 opinions.

23 So what we set out here for the experts and
24 selected bellwether cases is to provide some avenue for the
25 Court to be able to preview the expert opinions, not just

1 preview them but to assess them, on a case specific basis.
2 And are these competent and reliable expert opinions that
3 the Bair Hugger was in fact the cause of a particular
4 plaintiff surgical site infection in light of all of the
5 other potential risk factors that relate to a specific
6 plaintiff. And so we set that out. I think we're entitled
7 to challenge those specific expert opinions because they're
8 different from general opinions.

9 MAGISTRATE JUDGE NOEL: Just to be clear though,
10 as I understand the current pretrial order, number four,
11 that's not a line item in the current schedule; is that
12 correct?

13 MR. BLACKWELL: That is correct, Your Honor. It
14 is correct, and it was initially raised the last time we
15 were here because it wasn't there. And in any event, if we
16 ultimately felt that the plaintiff's experts were giving
17 plaintiff specific opinions that weren't real grounded or
18 founded and raised questions that are separate and different
19 from general causation questions, we would be back before
20 Your Honors in any event in that regard to raise those
21 issues just with respect to Your Honors gatekeeping function
22 if the experts' opinions need to be challenged.

23 And so the rest of this you'll see here we set up
24 a hearing date, a proposed one of September 12 of 2017, for
25 Daubert motions on any case specific experts with respect to

1 the bellwhether at the very end. So we proposed a date for
2 those case specific expert assessments.

3 So that's how we're seeing the schedule. And I
4 think a fundamental divide is that we are working, I think,
5 pretty feverishly to get the question, the general causation
6 question up to the decision line as soon as possible. And
7 our view is that largely they should have had most of this
8 assembled before they made the claim in the first place, and
9 so that to need, um, kind of well into 2017, or answer all
10 of our discovery requests about the basis for their
11 assertions is simply premature when they started a lawsuit
12 and made the assertions a problem. And so that's the
13 fundamental thing. And then fundamentally making sure that
14 we've got -- we attempted to have something built into the
15 schedule where we get to also challenge case specific expert
16 opinions to the extent they're different from the general
17 causation opinions. Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. GORDON: Your Honors, may I respond briefly?

20 THE COURT: Go ahead.

21 MR. GORDON: Thank you. I'll try to be very
22 succinct. Ben Gordon again for the plaintiffs.

23 So four main areas I would like to respond to, if
24 I could. First, as to the timing issue, I did want to add
25 to Your Honors inquiry earlier concerning the holiday issue,

1 which I think is one of the issues that it has taken us a
2 full seven months up to this point to get the level of
3 production, and I've realized we've had some squabbles along
4 the way, but we're seven months into it to get where we are
5 at this point, and I just think that trying to get finished
6 by the end of the year is going to be a tall order, and I
7 want to make sure we have as much time as we can to complete
8 that part of the case. I think getting into January
9 hopefully will allow us to do that.

10 Number two, on this DFS issue, I probably didn't,
11 I wasn't as clear as I could have been before. I'm not
12 talking about just meeting our burden of proof to show the
13 Court that a particular plaintiff has been impacted by a
14 particular machine. We have to meet that burden, and we are
15 doing that through the medical records to the extent that's
16 possible. Most of the time it is.

17 But in terms of the relationships that the
18 defendant has with the suppliers of these machines, many
19 times the hospitals don't even own the machines, but they
20 know who do. 3M will lease the machines to them or give the
21 machines to them, and we don't have that information from
22 the third parties. Now, yes, we can do third party
23 discovery, and we're doing it. We think it would be like it
24 is in most MDLs much more efficient to have 3M who has that
25 information, it's not burdensome, supply that information to

1 us in the form of a very brief and easy to complete Defense
2 Fact Sheet.

3 And I will tell you for what it's worth, Your
4 Honors, that Judge Davis has done that in an MDL here in
5 this district. Judge Frank has done it in Guidant and
6 Stryker. Judge Rosenbaum did it in Medtronic. Judge
7 Tunheim has done it in Levaquin and recently in the
8 Fluoroquinolone case. In each case, these judges have
9 ordered the defendants to produce a Defense Fact Sheet.

10 How burdensome it has to be and what's in it, we
11 can talk about it. We can work that out, but it doesn't
12 have to be an act of Congress to get that done. It can be a
13 very short one or two page form.

14 MAGISTRATE JUDGE NOEL: Mr. Blackwell correct that
15 the Defendant's Fact Sheet was not a line item in the
16 original pretrial order number 4?

17 MR. GORDON: Yes, Your Honor, Judge Ericksen shot
18 us down on that. He's correct on that.

19 THE COURT: So you still have the ability to ask
20 for that in discovery as we discussed a while ago.

21 MR. GORDON: Yes, Your Honor. We can ask, but it
22 will be serial discovery for each plaintiff case
23 specifically in their case unless you're suggesting, Your
24 Honor, that we can ask you for a Defense Fact Sheet,
25 separate and apart from the -- I understand you said we can

1 propound individual interrogatories or a request to produce
2 in each and every plaintiff's case as we're doing. And to
3 the extent that the MDL, the purpose is for the MDL to be
4 efficient and streamlined, we're trying to use the DFS for
5 that reason, just like we're doing the PFS, Your Honor.
6 Same rationale as the Plaintiff's Fact Sheet to try to
7 minimize the burden on all the parties and the Court.

8 Number three, with respect to the issue of the
9 timing of the depositions, I don't want to beat a dead horse
10 on that, Your Honors, but they're going to have our expert
11 reports. So for Mr. Blackwell to stand up here and say
12 they're not going to say what their experts are going to say
13 I just don't think is fair. They're going to have very
14 thorough going Rule 26 reports. They're going to know what
15 those witnesses will say. They were here at science day.
16 They have the experts.

17 Mr. Blackwell stood up here at science day and
18 made a big deal of the fact that he believes our entire case
19 is predicated on all of these studies for whom the authors
20 are being deposed very soon. So they know what our experts
21 are going to say, and they will certainly know by the time
22 we give the Rule 26 reports.

23 Finally, Your Honors, on this issue relating to
24 timing of the fact specific discovery, I think Mr. Blackwell
25 is conflating a couple of issues, and it's not something we

1 briefed for the Court yet, but I think we're going to have
2 to, he's right, at the Daubert stage.

3 But the idea that we have to as plaintiffs prove
4 that in each and every case the Bair Hugger was the sole
5 cause or to the exclusion of each and every individual cause
6 I think he said is ludicrous. That's not the law, Your
7 Honors. It's not the law in this district. I don't think
8 it's the laws in any district that I'm aware of.

9 The law says that we have to prove that the Bair
10 Hugger was a substantial contributing factor in the
11 development of their disease. And it's my belief at this
12 time that with our general experts and the evidence that
13 we're going to proffer to the Court before we get to this
14 final bellwether stage after the bellwethers are selected,
15 we're going to have that proof, and we're going to have to
16 produce that proffer before the Court. And we will win
17 those Daubert motions based on the general causation experts
18 that we have.

19 That said, to have the ability to come in in each
20 case and produce additional experts, we embraced it because
21 Mr. Blackwell actually put it in his brief last time. The
22 reason it wasn't before the Court until then is because Your
23 Honors didn't put it in the original pretrial scheduling
24 order, and we think that's appropriate under the law. We
25 think we can prove our case without it, but if we're going

1 to have the opportunity, and the defense wants the
2 opportunity at our election to produce initial experts to
3 say we have case specific additional experts to prove that
4 each and every case was specifically related to the machine,
5 then we'll do that. But we don't think it's our burden to
6 do that. We don't think we have to do it under the law in
7 this jurisdiction.

8 As to timing, the final thing I'll say is the
9 reason we put June in for the timing in terms of the Daubert
10 reports and all is because if the Court accepts our sort of
11 expert discovery window which runs from roughly March to
12 June, that will put the expert issue, the Daubert issue
13 right in the middle of that window, and we believe the Court
14 would rather have that discovery complete and the parties in
15 order to have the Daubert motions heard then after that, so
16 we put June 15th. Thank you.

17 MAGISTRATE JUDGE NOEL: Thank you.

18 MR. BLACKWELL: Could I have a minute to respond,
19 Your Honor?

20 THE COURT: Just a second. June 15th was the
21 original date. That's in the --

22 MR. GORDON: I don't have the original order, Your
23 Honor. It may be. We did submit a red line. You're right,
24 Your Honor. We left that unchanged.

25 THE COURT: Mr. Blackwell.

1 MR. BLACKWELL: Your Honor, just briefly, in the
2 event I need to respond to this DFS issue further or at all,
3 I still don't quite get it. I mean to the extent they're
4 saying that they need discovery from 3M as to which
5 hospitals where the Bair Hugger unit may have been sold, the
6 plaintiff's lawsuit started claiming that the plaintiff used
7 a 3M Bair Hugger in a specific hospital or facility. That's
8 already in their Plaintiff's Fact Sheets.

9 So I don't know what exactly they're looking for
10 from us that they don't presumably already have in that
11 regard. It's how they're claims begin claiming that there
12 was a Bair Hugger used in a specific hospital and it caused
13 injury. And so it's still not clear to me what it is they
14 would be looking for in a DFS.

15 And we will be back before the Court with respect
16 to the discovery. And I think we have something to submit
17 to the Court tomorrow on our outstanding discovery issues
18 and the chart, and I'll just defer that to bring up those
19 issues then and there, but we certainly don't want to have
20 to wait until we get the plaintiff's expert reports to
21 understand completely what the basis is for the claims that
22 they have made, meaning that we get no other discovery
23 before then about what it's about. And science day wasn't
24 that. They didn't discuss really one scientific study on
25 science day.

1 So, and, Your Honor, I'll defer then discussions
2 also about what causation is and how it will be defined to
3 an appropriate point in the case, but substantial
4 contributing factor should raise eyebrows already. I mean
5 this isn't akin to a dose dependent disease. I mean so
6 either the Bair Hugger introduced bacteria that caused the
7 infection or it did not. And it can't have done it just a
8 little bit, and so either it did or it didn't.

9 So we're going to have a real argument over that
10 in terms of what causation means, but I'll defer that to the
11 appropriate time.

12 THE COURT: All right. Well, we will issue an
13 order resolving these various positions with respect to the
14 pretrial order. And let's see what else we have to decide.

15 Amended master complaint and answer.

16 Okay. The next status conference is October 13th,
17 right? And I have that as being at 9:30 in the morning?

18 MR. GORDON: Thanks, Your Honor. I think we
19 requested that, and we appreciate that, Your Honor.

20 THE COURT: Now, going forward from November on,
21 will you similarly not like 2:00? You will similarly not
22 like 2:00. What's the best --

23 MR. GORDON: Yes, Your Honor. I think we had
24 mentioned last time we were hopeful for a lot of the parties
25 who or the lawyers who fly in and fly out that if we can

1 continue to do them in the morning after October, it doesn't
2 have to be as early as 9:30, but the morning is better if
3 possible.

4 MR. BLACKWELL: And we are simply models of
5 cooperation and flexibility.

6 THE COURT: All right. We'll take a look at our
7 schedule. I don't think that's going to be a problem.

8 MR. GORDON: Thank you, Your Honor.

9 THE COURT: Anything else?

10 (Off the record Court discussion.)

11 (In open court.)

12 MAGISTRATE JUDGE NOEL: Okay. So with regard to
13 the argument we had earlier regarding the status of the
14 custodians, Mr. Hulse, we're going to ask you to submit to
15 us and give to the plaintiff the list of the 25 custodians
16 you interviewed that you describe in your memo and identify
17 them by name, title, and brief job description. And if you
18 could get us that say by close of business tomorrow, I can
19 enter an order by Monday as to what we're going do on that
20 issue.

21 MR. HULSE: Thank you, Your Honor. I would have
22 had it sooner, but it's something I just need to pull
23 together in a form the Court can use.

24 MAGISTRATE JUDGE NOEL: Okay. That's all I have.

25 THE COURT: That's it. All right. We're in

1 recess.

2 MS. ZIMMERMAN: Your Honor, if we could, we have,
3 I think, one last issue on this.

4 THE COURT: All right. Please be seated. Court
5 is in recess. In out of recess. We're reconvened.

6 MS. ZIMMERMAN: Thank you, Your Honor. With
7 respect to, I think, it's the last item on the agenda. As I
8 think the Court is aware, we have some depositions starting
9 in the UK next week. I think that we're working together
10 with respect to some confidentiality issues and the use of
11 potential documents with some of these witnesses, but it's
12 possible we may need the Court's involvement even in advance
13 of that, and I think the first deposition is the 15th.
14 We're working on it this morning yet.

15 In addition, we had said or we had at the last
16 status conference requested potential insight from the Court
17 on how we might bring potential disputes. Right now the
18 depositions in the UK are set to go forward on the 15th.
19 There are two back-to-back depositions on the 17th in London
20 and then one on the 22nd, and I don't know what the Court's
21 instruction or preference might be about how to approach the
22 Court for any issues.

23 MAGISTRATE JUDGE NOEL: Issues that arise during
24 the course of the deposition itself?

25 MS. ZIMMERMAN: Yes, Your Honor.

1 THE COURT: What do you propose?

2 MS. ZIMMERMAN: Well, that's a good question. The
3 time zone makes it a little bit difficult. I know that
4 there is at least one deposition. I think two that are
5 happening in the afternoon in the UK, so perhaps the time
6 zones may not be as significant of an issue. And hopefully
7 this doesn't become an issue, but in the event that we need
8 to seek court intervention on something, we'd like to --

9 THE COURT: What are the dates again of your
10 depositions?

11 MS. ZIMMERMAN: September 15th. There are two
12 depositions then on Saturday the 17th, and then another
13 deposition on the 22nd.

14 THE COURT: And the time zone issue is six hours
15 between here and the UK?

16 MS. ZIMMERMAN: I believe that's correct, Your
17 Honor. Perhaps we could submit a list of the depositions,
18 the dates, and the times, and inquire by e-mail how the
19 Court would like to have it handled.

20 THE COURT: It would be seven hours by then after
21 daylight savings time. I'm not available those times. I'll
22 be in Europe. It's not a --

23 MAGISTRATE JUDGE NOEL: You can stop in.

24 MS. ZIMMERMAN: You can come watch.

25 MAGISTRATE JUDGE NOEL: I'm available by

1 telephone. I can't -- your last suggestion is the best,
2 submit us an e-mail of exactly when these depositions are
3 scheduled, and in the e-mail, tell us what time it is in
4 Minnesota. And over that weekend, what time it is on the
5 west coast.

6 MS. ZIMMERMAN: All right, I will do that. And
7 lastly, Your Honors, I think that the plaintiffs have
8 offered to update the Court on the status of depositions for
9 current and former employees. I believe that we now have an
10 agreement that November 2nd and November 4th we will go
11 forward with the depositions of Mr. Hanson and Mr. Rock.
12 That's all. Thank you.

13 THE COURT: For your depositions on the 15th,
14 17th, and 22nd, what time on the 15th?

15 MS. ZIMMERMAN: 2:30 in the afternoon in London I
16 believe.

17 THE COURT: What time is it going to be here?

18 MS. ZIMMERMAN: About 8:00 in the morning. I'm
19 testing Bridget's memory as well.

20 MS. AHMANN: It starts at 9:00 in the morning.
21 It's six hours difference. It starts at 3:00. So about
22 9:00 start.

23 THE COURT: Okay. Well, I'll be available that
24 morning. But what I was going to ask -- if I have
25 communication, it will only be Internet-type communication,

1 so maybe there's a phone on the Internet in an emergency,
2 but it's going to be tough.

3 MS. ZIMMERMAN: We certainly hope to avoid that.

4 THE COURT: Okay.

5 MS. ZIMMERMAN: Thank you.

6 MR. GORDON: Your Honor, may I be heard briefly
7 before we go back to recess? Very briefly, I promise.

8 I don't want to continue to bring up something
9 that I know the Court has already heard but my capable
10 liaison counsel, Dave Szerlag, who deals with all these
11 issues on the individual plaintiffs who file cases in these
12 MDLs made a couple of very good points that I did not make
13 with respect to the DFS, the Defense Fact Sheet. And, you
14 know, the information we get from the hospital doesn't
15 contain the implant or the machine identification
16 information frequently. We don't know empirically the model
17 number and the other indicia of authenticity of the machine.
18 Many times the machines are taken out. They're repurposed
19 by 3M. They're changed up. A lot of time we don't have
20 that information. And to get it, Your Honor, we're going to
21 have to take dozens, possibly hundreds of third party
22 depositions because the hospitals frequently don't know.
23 They punt this to 3M or whoever services the machine.

24 And so, again, under the heading of efficiency,
25 and if Your Honors wanted, I could submit to the defense and

1 to you a very short sample of what we're talking about, a
2 two or three page. We're not talking about a 25-page PFS
3 like we have, but maybe a two or three page Defense Fact
4 Sheet, so you could see how sort of benign and within their
5 kin the information is. It's not a burden on them, and we
6 think it's done in every MDL, and we appreciate your
7 considering it.

8 THE COURT: Mr. Blackwell?

9 MR. BLACKWELL: Your Honor, I feel like this issue
10 is from a Boris Karloff movie, and it's just every time you
11 think it's down, it rises up again and walks back up to the
12 podium and starts talking as it just did.

13 I'm not, they can see in the medical records which
14 plaintiff was claiming to be using a Bair Hugger device.
15 Their claims are general. The Bair Hugger causes this. It
16 doesn't depend on serial numbers, any of that. None at all.
17 They made this up. And as far as I know, what this is
18 really leading to is for them to simply want 3M to disclose,
19 you know, where they put Bair Hugger units across the entire
20 United States of America for purposes of perhaps finding
21 additional claimants.

22 MR. GORDON: That's outrageous. I object to that.
23 That's outrageous.

24 MR. BLACKWELL: I don't know. Otherwise, I'm
25 saying I don't know what this is for. But, Your Honors,

1 this has been addressed and readdressed I think to the end.
2 And, Judge Ericksen, I think you've been clear that to the
3 extent they need information, they can get it through
4 discovery, if they need it in discovery. And they have no
5 problems asking for what they need. They've asked for a lot
6 already.

7 THE COURT: All right. Does anybody have anything
8 else?

9 MR. HULSE: I have something different, Your
10 Honors.

11 Thank you. So we have a deadline to submit a
12 chart of up to four issues to Judge Noel tomorrow. We've
13 provided our issues to the plaintiffs. And as of the time
14 that I walked over here, we didn't have a list of issues and
15 don't know what the plaintiff's issues would be.
16 Respectfully, our view is that's a bit of a short
17 turnaround, particularly given that we need to vet
18 internally and with our client. And so all I wanted to
19 suggest, Your Honor, is assume that we get their issues
20 today, that we extend the deadline for submitting the chart
21 to Your Honor to Monday. One additional day. We just think
22 that this is likely too short a turnaround on that.

23 MAGISTRATE JUDGE NOEL: Who is addressing that on
24 the plaintiff's side? Ms. Zimmerman?

25 MS. ZIMMERMAN: Your Honor, if they're asking for

1 an additional day, we got their chart this morning. We're
2 happy to give them an additional day to Monday.

3 MR. HULSE: The premise of it being that we get
4 their chart today though. We need to have more than just
5 getting it the morning of.

6 MS. ZIMMERMAN: We'll work together on that.

7 MR. HULSE: Okay. Can we get --

8 MAGISTRATE JUDGE NOEL: You can get a date.
9 Tomorrow is Friday, so you want until Monday?

10 MR. HULSE: Can we get direction from the Court
11 that we'll have their chart by tomorrow morning first thing?

12 MAGISTRATE JUDGE NOEL: What's the status of the
13 plaintiffs?

14 MS. ZIMMERMAN: We were receiving followup items
15 to prioritize which of the two to four outstanding issues we
16 were going to put onto the chart, so we're happy to get that
17 to the defendants tomorrow.

18 MR. HULSE: Can we do it by 10 a.m. tomorrow
19 morning? I mean we were supposed to submit it tomorrow, and
20 it looks like we weren't even going to get this until --

21 MAGISTRATE JUDGE NOEL: Judge Ericksen has been
22 telling me that she's fascinated to see some of these
23 discovery disputes that district judges don't often get to
24 see. We're on a level of minutia that even I haven't seen.

25 THE COURT: Really it's not like this all the

1 time?

2 MR. HULSE: Your Honor, we just need to know what
3 their issues are and have time to prepare our response and
4 vet it with our client and so forth.

5 THE COURT: Why don't you make them have a fight
6 now?

7 MS. ZIMMERMAN: We'll get it to them by 10:00
8 tomorrow morning.

9 MAGISTRATE JUDGE NOEL: Call it 10:00, and we'll
10 look for your joint chart on Monday to me.

11 MR. HULSE: Very good. Thank you, Your Honor.

12 MAGISTRATE JUDGE NOEL: Okay, thank you. Now,
13 we're in recess.

14 (Court adjourned at 3:23 p.m.)

15
16 * * *

17
18 I, Maria V. Weinbeck, certify that the foregoing is
19 a correct transcript from the record of proceedings in the
20 above-entitled matter.

21
22 Certified by: s/ Maria V. Weinbeck

23 Maria V. Weinbeck, RMR-FCRR
24
25